Supreme Court, U.S.
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No. 91-1842

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES MCCRORY, ET AL.

v

RESOLUTION TRUST CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an agreement limiting petitioners' liability, which was found in a file in the office of a thrift institution's outside counsel, was an "official record of the depository institution" within the meaning of 12 U.S.C. 1823(e)(4) (Supp. II 1990).

2. Whether summary judgment was proper on the facts of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 951 F.2d 68. The opinions of the district court (Pet. App. B1-B7, C1-C3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1992. A petition for rehearing was denied on February 11, 1992. The petition for a writ of certiorari was filed on May 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1986, petitioners Charles and Margaret McCrory (the McCrorys) executed a $6.8 million promissory note payable to the order of Sunbelt Savings Association of Texas (Old Sunbelt). The note was secured by a deed of trust lien on the North Park Terrace Apartments. Pet. App. A3, B1.

On July 23, 1987, the McCrorys and Old Sunbelt entered into an assumption agreement whereby title in the Apartments was transferred from the McCrorys to North Park Terrace, Ltd., a Florida limited partnership. North Park Terrace's general partner was petitioner First Florida Management Associates (FFMA). Petitioners Walter McCrory and Thomas J. Ryan, III were the general partners of FFMA. North Park Terrace assumed all obligations under the note. The assumption agreement provided that the McCrorys remained liable for their obligations under the Note. Pet. App. A3-A4, B2.

Also on July 23, 1987, R. Alan Doan, a Senior Vice President of Old Sunbelt, and petitioners FFMA, Walter McCrory, and Ryan entered into a letter agreement (Side Agreement) that limited the liability of Walter McCrory, Ryan, and FFMA for North Park Terrace's indebtedness to FFMA's interests in North Park Terrace and the Apartments. Pet. App. A4, B2. Although the Side Agreement was apparently one of the documents executed on the day of the closing, it was not included in Old Sunbelt's files. The original of the Side Agreement was later found in the "draft (documents)" file of Old Sunbelt's outside counsel, who handled the closing. Pet. App. A4; Gov't C.A. Br. 8.

On August 19, 1988, Old Sunbelt was declared insolvent and the Federal Savings and Loan Insurance Corporation was appointed as receiver. FSLIC and

Sunbelt Savings, FSB (Sunbelt), Old Sunbelt's successor, then executed an acquisition agreement which transferred certain assets from FSLIC to Sunbelt, including the Note and Assumption Agreement. Pet. App. A4; Gov't C.A. Br. 8-9.

During the same month, there was a default in payments on the Note and the Assumption Agreement. Gov't C.A. Br. 10. After unsuccessfully demanding that the default be cured, Sunbelt accelerated the indebtedness and all unpaid amounts became due and payable. Pet. App. A4.

2. On September 26, 1989, Sunbelt filed suit in the United States District Court for the Northern District of Texas against the McCrorys and North Park Terrace. Pet. App. A4. Sunbelt subsequently dismissed North Park Terrace, after it had filed for bankruptcy in the United States Bankruptcy Court for the Northern District of Texas. Sunbelt also added FFMA, Walter McCrory, and Ryan as defendants. FFMA, Walter McCrory, and Ryan asserted affirmative defenses and a counterclaim based upon the limitation of liability in the Side Agreement. Gov't C.A. Br. 3.

After petitioners asserted that the Side Agreement had limited their liability, an officer of Sunbelt reviewed Sunbelt's files and was unable to locate a copy of the Side Agreement. In response to petitioners' discovery requests concerning materials relating to the existence of the Side Agreement, Sunbelt produced over 5,000 pages of documents. Petitioners also took the deposition of John Fox, the outside attorney who handled the July 23, 1987, closing, and three Old Sunbelt officers who participated in the closing. Those efforts failed to produce any evidence that the Side Agreement ever existed in Old Sunbelt's files. Gov't C.A. Br. 7-8.

Fox testified at his deposition that in preparing for his deposition he found the original of the Side Agreement in a file marked "drafts (documents)," in which he did not ordinarily keep executed documents in the normal course of his law practice. Fox stated that he misplaced the Side Agreement either during or shortly after the July 23, 1987 closing. Gov't C.A. Br. 8.

On October 5, 1990, the district court granted Sunbelt's motion for summary judgment and denied petitioners' cross-motion for summary judgment. Pet. App. A4-A5, B1. The court held that *D'Oench Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), barred enforcement of the Side Agreement. Pet. App. A4-A5, B5. On December 5, 1990, the district court granted Sunbelt's motion for summary judgment on petitioners' counterclaim, holding that it too was barred by *D'Oench*. Pet. App. C1.

3. Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. While the case was on appeal, the Office of Thrift Supervision (OTS) declared Sunbelt insolvent and appointed the Resolution Trust Corporation as receiver.* Pet. App. A5.

* The RTC and Sunbelt Federal Savings, FSB (Sunbelt Federal), a new thrift created by OTS, then executed an acquisition agreement, which transferred certain assets, including the district court's judgment in this case, from the RTC to Sunbelt Federal. OTS also placed Sunbelt Federal into conservatorship and appointed the RTC as its conservator. Pet. App. A5. As conservator, the RTC succeeded to all rights, titles, powers and privileges of Sunbelt Federal, including the right to conduct its operations and the title to its assets. See 12 U.S.C. 1441a(b)(4), 1821(d)(2)(A)(i) and (B)(i) (Supp. II 1990); Pet. App. A5. The RTC thus succeeded to Sunbelt Federal's right to collect the judgment in this case. See 12 U.S.C. 1441a(b)(4), 1821(d)(2)(B)(i) (Supp. II 1990); Pet. App. A5.

On May 23, 1991, the Fifth Circuit substituted the RTC for Sunbelt as plaintiff-appellee. Pet. App. A5-A6.

On January 15, 1992, the Fifth Circuit affirmed the district court's judgment on the ground that the Side Agreement was unenforceable under 12 U.S.C. 1823(e) (Supp. II 1990), thus rendering it unnecessary to consider the application of the *D'Oench Duhme* doctrine to this case. Pet. App. A8, A9. The court held that the defenses and counterclaim based upon the Side Agreement were barred by Section 1823(e)(4), which prohibits defenses premised on an agreement with a failed depository institution unless, among other things, the agreement "has been, continuously, from the time of its execution, an official record of the depository institution." 12 U.S.C. 1823(e)(4) (Supp. II 1990); Pet. App. A8. The court found "no cases which aid our interpretation of the term 'official record of the depository institution' " and noted that it did "not now seek to promulgate any comprehensive definition of that term." Pet. App. A8. The court held, however, that on the facts of this case "the 'draft (documents)' file of the bank's outside attorney does not constitute 'an official record of the depository institution.' " *Ibid.*

ARGUMENT

1. Petitioners concede that no decision of any other court of appeals conflicts with the Fifth Circuit's construction of Section 1823(e) in this case. Pet. 7. They assert, however, that the court of appeals held that an "official record of the depository institution" under 12 U.S.C. 1823(e) (Supp. II 1990) must "reference solely documents residing on the physical premises of a failed institution," thus "extend[ing] a location-specific element to the statutory requirement

contained in Section 1823(e)(4)." Pet. 8. They argue that such a location-specific requirement cannot be found in the language of Section 1823(e)(4) and is at odds with modern banking practice. Pet. 8-9, 9-11.

Initially, petitioners' argument is based upon a misreading of the court of appeals' opinion. The court of appeals neither explicitly nor implicitly held that a file found outside the premises of a depository institution could not be an "official record" for purposes of Section 1823(e)(4). Rather, the court expressly refused "to promulgate any comprehensive definition" of "official record," and "merely h[e]ld that the 'draft (documents)' file of the bank's outside attorney" does not constitute such a record. Pet. App. A8. Accordingly, this case does not present the general question on which petitioners seek review—whether a document found outside the physical premises of a depository institution can ever be an "official record" of that institution. Instead, this case raises only the question whether, on the particular facts of this case, the Side Agreement comes within the phrase "official record of the depository institution." Further review to resolve that fact-bound question is not warranted.

In any event, the court of appeals correctly decided the narrow question presented in this case. In *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987), this Court noted that "[o]ne purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." The Court explained that such evaluations must often be conducted "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." 484 U.S. at 91. Relying on that reasoning, the court of appeals correctly held that a document located

outside a thrift's premises in an attorney's file not ordinarily used to store executed documents would not have been available to banking examiners who needed to ascertain quickly and accurately the value of the thrift's assets and liabilities. Pet. App. A8.

Petitioners argue that the equities of this case favor them, because Walter McCrory and Ryan could have done nothing to ensure that a copy of the Side Agreement would be placed in Old Sunbelt's files. Pet. 11-13. As this Court explained in *Langley*, however, "Congress opted for the certainty of the requirements set forth in § 1823(e)" and "an agreement that does not meet them fails" regardless of the equities presented by a particular plaintiff. 484 U.S. at 95. The language of Section 1823(e) does not permit a court "to engraft an equitable exception upon the plain terms of the statute." 484 U.S. at 94.

2. Petitioners also assert that the Fifth Circuit did "not require[] the [RTC] to make a proper showing that, at the time federal regulators seized Old Sunbelt, the petitioners' [Side Agreement] was not contained in the files maintained on the premises of the failed institution." Pet. 13. The failure to require the government to make such a showing, according to petitioners, amounted to a violation of the Due Process Clause.

Although petitioners quarrel with one of the district court's rulings concerning a privilege issue (see Pet. 15 n.4), they were afforded ample opportunity for discovery and for presentation of their case to the district court. Accordingly, their rights under the Due Process Clause were respected. Their claim thus reduces to the contention that summary judgment under Fed. R. Civ. P. 56 was improperly granted in this case because the question whether the Side Agreement was located in the Old Sunbelt's files at

the time the institution was seized presented a genuine issue of material fact.

Petitioners' fact-bound claim that the courts below erred in applying the standards for summary judgment under Rule 56 to the particular facts of this case does not warrant further review. This Court has made clear that "a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotations omitted). The nonmoving party must present evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Petitioner failed to meet that standard.

As petitioners concede (Pet. 16 n.5), the RTC produced an uncontroverted affidavit that, when a search of Old Sunbelt's files was finally conducted, the Side Agreement could not be found. By contrast, petitioners were unable to introduce any evidence that the Side Agreement was in the files of Old Sunbelt at the time of seizure. To be sure, the court of appeals stated that the Side Agreement was referred to in copies of two transmittal letters that were in Old Sunbelt's files. As the district court noted, however, those "brief references would not enable a bank examiner to understand the agreement" and bank examiners would not, "merely by reading that a letter agreement, not contained in the bank's files, had been transmitted under two separate cover letters, be aware [of] the limitation on the liability." Pet. App. B4-B5. In those circumstances, the courts below correctly found that petitioners had not introduced any evidence, beyond mere allegations, that the Side Agreement was in Old Sunbelt's files at the time of

its seizure by federal authorities. Accordingly, summary judgment was properly entered against petitioners in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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